VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

CIVIL DIVISION

VCAT REFERENCE NO. D916/2006

DOMESTIC BUILDING LIST

CATCHWORDS

Costs – whether indemnity costs should be ordered – relevant considerations o *Victorian Civil and Administrative Tribunal Act* 1998 – s109

APPLICANT/FIRST RESPONDENT TO COUNTERCLAIM	Seachange Management Pty Ltd (ACN 091 443 211)
FIRST RESPONDENT/ APPLICANT BY COUNTERCLAIM	Bevnol Constructions and Developments Pty Ltd (ACN 079 170 577)
SECOND RESPONDENT	Bruce Jamieson
THIRD RESPONDENT	Louis Allain
SECOND RESPONDENT TO COUNTERCLAIM	Giuseppe De Simone
THIRD RESPONDENT TO COUNTERCLAIM	Paul Marc Custodians Pty Ltd
FOURTH RESPONDENT TO COUNTERCLAIM	Martin Jurblum
WHERE HELD	Melbourne
BEFORE	Deputy President C. Aird
HEARING TYPE	Costs hearing, 'on the papers'
DATE OF ORDER	22 July 2011
CITATION	Seachange Management Pty Ltd (ACN 091 443 211) v Bevnol Constructions and Developments Pty Ltd (ACN 079 170 577) and Ors (Domestic Building) [2011] VCAT 1406

ORDER

1. Seachange must pay Bevnol's costs of and incidental to Seachange's application dated 15 September 2008 under s75 of the *Victorian Civil and*

Administrative Tribunal Act 1998 that paragraphs 31-35 of Bevnol's Counterclaim be struck out.

2. Mr De Simone must pay Bevnol's costs of and incidental to his stay application.

3. Seachange must pay Bevnol's costs of and incidental to Bevnol's application dated 11 December 2007 that Seachange comply with the tribunal's orders dated 12 July 2007 and provide further and better particulars of its claim.

4. There are no orders for costs of Seachange's application to deny Bevnol access to the 'subpoenaed documents'.

5. Bevnol must pay Seachange's costs of and incidental to Bevnol's application dated 30 October 2008 for an asset preservation order.

6. Bevnol shall pay the Jurblum parties' costs of the asset preservation application fixed in the sum of $2,600.

7. In default of agreement in respect of any or all of the costs orders set out above, such costs are to be assessed by the Victorian Costs Court on a party/party basis on the Supreme Court Scale.

DEPUTY PRESIDENT C. AIRD

REASONS

1 This proceeding has had a long and tortuous history and the background is well known. On 8 March 2011 Justice Ross ordered the proceeding be struck out pursuant to s77(1) of the *Victorian Civil and Administrative Tribunal Act* 1998 ('the VCAT Act') and referred to the Supreme Court pursuant to s77(3). Further, that the orders under s77 were to take effect from 25 March 2011.

2 The proceeding was commenced on 21 December 2006 and although there were numerous interlocutory applications, it was far from being ready for hearing when it was referred to the Supreme Court. Costs applications have been made by the parties in relation to the costs of a number of the interlocutory applications. On 8 March 2011 Justice Ross ordered that all outstanding costs applications, and any application for the costs of the asset preservation order proceedings would be determined on the papers. He made directions for the filing of submissions by the parties (including the extension of the time for filing of submissions which had previously been ordered). His Honour subsequently referred the applications to me for determination.

3 I subsequently made orders on 11 April and 5 May 2011 further extending the time for the filing of submissions. On 11 April I noted the applications and submissions which had been received before making the following orders:

> 1. By 29 April 2011 the parties must file and serve any further submissions. **Other than in exceptional circumstances, and then only with leave of the tribunal, any submissions received after 29 April 2011 will not be considered by the tribunal in determining the costs applications.**
>
> 2. If there are any outstanding costs applications which are not listed above copies must be filed and served by 4:00 p.m. on 19 April 2011.
>
> 3. If there are any submissions which have been filed and served which are not referred to in these orders, further copies must be filed with the tribunal by 4:00 p.m. on 19 April 2011 together with proof that such submissions have been previously filed and served.
>
> 4. Where a party seeks to rely on transcript copies of the relevant pages of the transcript must be filed with the tribunal by 29 April 2010, the tribunal's copy of the transcript having been delivered to the Supreme Court with the file on 25 March 2011.

4 On 5 May 2011, with Seachange's consent, I extended the time for Bevnol to file submissions in reply to Seachange's submissions in support of its application for costs dated 10 February 2011 to 13 May 2011. Bevnol filed those submissions on 13 May 2011. I also extended the date by which Mr

De Simone was to file any further submissions to 9 May 2011, Mr De Simone having advised the tribunal by email that he was having difficulty with internet connections in Fiji. I again ordered that any submissions received after the dates set out in those orders would not be considered other than in exceptional circumstances, and then only with leave of the tribunal. No further submissions have been received from Mr De Simone.

5 As has been remarked upon in a number of the decisions, there have been an unusually large number of interlocutory applications in this proceeding. A review of Austlii reveals 15 written decisions, one of which where Mr De Simone and Bevnol are recorded as the principal parties. During the currency of the proceeding at the tribunal I had the primary responsibility for its case management. Each step has been fraught with obstacles placed by each of the primary parties: Seachange and Mr De Simone on the one hand, and Bevnol on the other. At times there has been a glaring lack of objectivity, not only by the parties but also by their solicitors, with numerous, unnecessary and often ill-founded personal comments and attacks. I do not extend these comments to the conduct of counsel.

THE COSTS APPLICATIONS

6 There are six costs applications to determine: four by Bevnol; one by Seachange and one by the 'Jurblum Parties' (as set out below). Extensive written submissions have been filed on behalf of the parties. Inexplicably, many of the submissions canvass issues that were before the tribunal when the various applications were heard and determined. The substantive issues in relation to each application have been determined and cannot now be revisited.

7 Before considering each of the applications it is convenient to first set out the principles to be applied.

Section 109

8 In considering any application for costs I must have regard to s109 of the VCAT Act which provides that each party must bear its own costs of a proceeding, unless the tribunal is persuaded it should exercise its discretion under s109(2) having regard to the matters set out in s109(3), and then, only if it is satisfied it is fair to do so. Section 109 provides:

> The Tribunal may make an order under sub-section (2) only if satisfied that it is fair to do so, having regard to—
>
> (a) whether a party has conducted the proceeding in a way that unnecessarily disadvantaged another party to the proceeding by conduct such as—
>
> (i) failing to comply with an order or direction of the Tribunal without reasonable excuse;
>
> (ii) failing to comply with this Act, the regulations, the rules or an enabling enactment;

(iii) asking for an adjournment as a result of (i) or (ii);

(iv) causing an adjournment;

(v) attempting to deceive another party or the Tribunal;

(vi) vexatiously conducting the proceeding;

(b) whether a party has been responsible for prolonging unreasonably the time taken to complete the proceeding;

(c) the relative strengths of the claims made by each of the parties, including whether a party has made a claim that has no tenable basis in fact or law;

(d) the nature and complexity of the proceeding;

(e) any other matter the Tribunal considers relevant.

9 In *Vero Insurance Ltd v The Gombac Group Pty Ltd*,[1] Gillard J set out the approach to be taken by the Tribunal when considering an application for costs:

> i. The prima facie rule is that each party should bear their own costs of the proceeding.
>
> ii. The Tribunal may make an order awarding costs, being all or a specified part of costs, only if it is satisfied that it is fair to do so having regard to the matters stated in s109(3). That is a finding essential to making an order. (emphasis added)

What scale should apply to any order for costs?

10 In each instance the parties have applied for costs on an indemnity basis, or alternatively to be assessed in accordance with the Supreme Court Scale. Given the quantum of the parties' respective claims, I am satisfied the Supreme Court Scale is the appropriate scale.

When might orders for Indemnity costs be made?

11 As confirmed in *Pacific Indemnity Underwriting Agency Pty Ltd v Maclaw No 651 Pty Ltd*[2] indemnity or solicitor/client costs should only be ordered in exceptional circumstances. As Nettle JA said:

> 'I also agree … that where an order for costs is made in favour of the successful party in domestic building list proceeding, the costs should ordinarily be assessed on a party/party basis … Of course there may be occasions when it is appropriate to award costs in favour of the successful client in domestic building proceedings on an indemnity basis. Those occasions would be exceptional …' [91-92]

12 The circumstances in which an order for indemnity costs might be made were recently considered by the tribunal in *Milankovic v Binyun Pty Ltd and*

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1 [2007] VSC 117.

2 [2005] VSCA 165.

Ors.[3] In refusing an application for indemnity costs, Lothian SM referred to *Sholl Nicholson Pty Ltd v Chapman (No 2)*[4] and summarised the matters Balmfod J set out to be taken into account when considering whether to order indemnity costs at [26].

i Whether a party has been forced to take legal proceedings entirely through the wrongful or inappropriate conduct of the other party;

ii Whether an action has been commenced or continued in circumstances where the applicant, properly advised, should have known he had no chance of success;

iii Where a party persists in what should, on proper consideration, be seen to be a hopeless case;

iv Whether the party against whom indemnity costs are sought has made a false allegation of fraud;

v Particular misconduct that causes a loss of time to the Court and the parties;

vi Commencing or continuing proceedings for an ulterior motive or in wilful disregard of known facts or clearly established law;

vii Making allegations which ought never to have been made or undue prolongation of a case by groundless contentions, and

viii An imprudent refusal of an offer of compromise.

13 It will only be in the most exceptional circumstances that an order for indemnity costs will be made; for instance where a party has engaged in contumelious or high handed conduct.

BEVNOL'S COSTS APPLICATIONS

14 Bevnol filed four costs applications dated 12 October 2010 on 14 October 2010. The orders sought by Bevnol, as more clearly set out in the Respondent's Outline Costs Submissions dated 5 November 2010, are:

1. The Applicant, Seachange, is to pay Bevnol's costs of and incidental to Seachange's application dated 16 September 2008 to strike out paragraphs [31]–[35] of Bevnol's Counterclaim on an indemnity basis such costs to be taxed in default of agreement on the Supreme Court Scale; ('Seachange's strike out application')

2. The Second Respondent by way of Counterclaim, Mr De Simone, to pay Bevnol's costs of and incidental of De Simone's email application dated 3 June 2008 to stay parts of Bevnol's counterclaim as against De Simone and Seachange on an indemnity basis, such costs to be taxed in default of agreement on the Supreme Court Scale; ('Mr De Simone's stay application')

3. The Applicant, Seachange, is to pay Bevnol's costs of and incidental to Bevnol's application dated 11 December 2007 for

[3] [2010] VCAT 538.
[4] [2001] VSC 462.

Seachange to comply with the orders of the VCAT dated 12 July 2007 by providing Further and Better Particulars of its claims, on an indemnity basis, such costs to be taxed in default of agreement on the Supreme Court Scale. ('Bevnol's application for further and better particulars')

4. Seachange and De Simone jointly and severally to pay Bevnol's costs of and incidental to Seachange's application dated 24 April 2009 to deny Bevnol access to subpoenaed documents, on an indemnity basis, such costs to be taxed in default of agreement on the Supreme Court Scale. ('Seachange's application to deny Bevnol access to subpoenaed documents')

15 Before considering each of the applications in turn, it is appropriate to address some of the general issues raised on behalf of Bevnol.

16 Much has been made by Bevnol of the failure by Seachange and Mr De Simone to comply with the tribunal's orders and what are described as indulgences to allow them time to do so. Both parties have set out chronologies in their submissions. A review of these, and the tribunal's orders, indicates that both parties have been the beneficiaries of extensions of time and have not always complied with those orders. For instance, and despite orders to do so, Bevnol has not filed any expert reports in response to the reports filed by Seachange.

17 Section 98 of the VCAT Act requires the tribunal to afford all parties procedural fairness and natural justice, and under s97 to decide each case on its merits. It is desirable that all relevant material be before the tribunal when considering complex interlocutory applications.

18 Although I propose to consider each application for costs separately, this has been made difficult by Bevnol having made global submissions in relation to all of its costs applications. For instance, in its submissions of 5 November 2010 it submits that Seachange/Mr De Simone have vexatiously conducted each of the applications. I am referred to the decision of Senior Member Cremean in *LifeLine Properties v HGF and Anor*[5] where he quoted with approval the decision in *J & C Cabot v City of Keilor*[6] [1994] 1 VR 220 where Gobbo J dealt with costs in proceedings brought vexatiously. Justice Gobbo, in turn referred to the following comments by Roden J in *Attorney General (Vic) v Wentworth*:[7]

> … it seems litigation may properly be regarded as vexatious for present purposes on either objective or subjective grounds. I believe that the test may be expressed in the following terms:
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> 1. proceedings are vexatious if they are instituted with the intention of annoying or embarrassing the person against whom they are brought;

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5 DBT 10 September 1996.
6 [1994] 1 VR 220.
7 (1988) 14 NSWLR 481 at [491].

2. they are vexatious if they are brought for collateral purposes and not for the purpose of having the Court adjudicate on the issues to which they give rise;

3. they are also properly to be regarded as vexatious if, irrespective of the motive of the litigant they are so obviously untenable or manifestly groundless as to be utterly hopeless.

However, it is not said how each of the applications might be considered vexatious.

Seachange's 'strike-out' application

19 On 15 September 2008[8] Seachange made an application under s75 of the VCAT Act that paragraphs 31-35 of Bevnol's Counterclaim be struck out. These paragraphs related to the 'Development Agreement'. I heard this application on 27 October and 6 November 2008 and dismissed it by Orders dated 12 December 2009 which were accompanied by Reasons.[9]

20 After noting that the matters raised by Seachange in support of its s75 application were first raised in its Points of Defence to Counterclaim, more than a year before the application was made, I determined that the matters raised by Seachange were essentially its defences to the counterclaim. The application was entirely lacking in merit and having regard to s109(3)(c) I am satisfied it is fair to exercise the tribunal's discretion under s109(2) and order Seachange to pay Bevnol's costs of and incidental to the strike out application.

21 I am not persuaded that Bevnol suffered any specific disadvantage by the late service of Seachange's Reply Submissions at the directions hearing on 27 October 2008. Counsel for Bevnol could have, but did not seek an adjournment, and responded to them at the directions hearing. The directions hearing was not unduly prolonged by the late service of the Reply Submission. Noting my earlier comments, I am not persuaded that there is anything so exceptional in Seachange's conduct of this application to attract an order for indemnity costs.

Mr De Simone's stay application

22 In 2008 Mr De Simone made an application that there be a partial stay of Bevnol's counterclaim insofar as it included claims against him personally. This application was made by email dated 2 June 2008 before Mr De Simone had been charged with any offences (he was subsequently charged with various criminal offences and has been committed for trial). This was heard and determined by Judge Ross, as he then was, over 2 days, on 24 July 2008 and 26 September 2008. The application was dismissed by orders dated 25

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[8] Although in the Submissions dated 5 November 2010 counsel for Bevnol asserts that Seachange's strike-out application was made by email to the tribunal on 3 June 2008 I have recorded in my Reasons of 12 December 2008 that this application was made on 15 September 2008.

[9] *Seachange Management Pty Ltd v Bevnol Constructions &Developments Pty Ltd & Ors (Domestic Building)* [2008] VCAT 2541

November 2008.[10] The Court of Appeal dismissed Mr De Simone's appeal on 3 April 2009.[11]

23 I am not satisfied that Bevnol suffered any disadvantage which would attract any of the matters set out in s109(3) by Seachange filing its submissions late on 24 July 2008 and 23 September 2008. I am not persuaded that the late filing of submissions by Mr De Simone on 23 September, which Bevnol notes comprised 144 paragraphs and 88 new matters, caused any delay. The hearing proceeded as scheduled on 26 September 2008 and it is irrelevant that it concluded at 4.45pm.

24 However, having regard to the matters set out in s109(3)(c) and (d) I am satisfied it is fair to exercise the tribunal's discretion under s109(2) and order Mr De Simone to pay Bevnol's costs of and incidental to his stay application. Noting my earlier comments, I am not persuaded there is anything so exceptional in Mr De Simone's conduct of this application to attract an order for indemnity costs.

Bevnol's application for further and better particulars

25 Bevnol seeks the costs of its application dated 11 December 2007 that Seachange comply with the tribunal's orders dated 12 July 2007 (the orders were seemingly made at a Directions Hearing on 7 July 2007 but are dated 12 July 2007).

26 For various reasons, which are not relevant here, Bevnol's application was not heard until 27 October 2008 and 6 November 2008 and it was determined on 12 December 2008. The orders and reasons for 12 December 2008 concerned both Seachange's strike out application, and Bevnol's application for further and better particulars.

27 Order 10 of the Orders of 12 July 2007 provides:

> By 6 August 2007 the Applicant will file and serve the Further and Better Particulars sought in the request of the First Respondent dated 29 June 2007.

28 Order 2 of the orders of 12 December 2008 is relevant:

> 2. The applicant must file and serve answers to the Request for Further and Better Particulars dated 29 June 2007 insofar as it relates to paragraphs 7.6A and 8 of the Further Amended Points of Claim dated 28 May 2008 as follows:
>
> (i) insofar as they relate to requests for particulars of the loan facility – by 27 January 2009; and
>
> (ii) insofar as they relate to the alleged incomplete and defective works – by 11 March 2009.

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10 *Seachange Management Pty Ltd v Bevnol Constructions &Developments Pty Ltd & Ors (Domestic Building)* [2008] VCAT 2629 (25 November 2008).

11 *De Simone v Bevnol Constructions & Developments Pty ltd* [2009] VSCA 199

29 Although Seachange filed and served Further Amended Points of Claim on 26 May 2008 these did not include the particulars sought in the Request dated 29 June 2007.

30 At paragraphs 31 and 32 of my Reasons of 12 December 2008 I said:

> 31. I am not persuaded that Seachange has any reasonable excuse for its failure to respond to the Request. Although the orders of 12 July 2007 require Seachange to provide the 'Particulars' sought, the Reasons dated 23 July 2007 make it clear that:
>
> > …In relation to the answers of the Request for Further and Better Particulars these merely come down to whether they are correct and proper requests, again evidence of the behaviour of the parties has little or no bearing on whether any such requests should be answered. [8]
>
> 32. Seachange is not required to do anything more than answer the Request. If it does not understand the request, or is unable for whatever reason to provide the further and better particulars it should respond to the Request in those terms.

31 This application was not entirely successful. Bevnol did not succeed in its application that detailed particulars, with exquisite specificity, be provided of the alleged defective and incomplete works (I ruled that an expert report identifying those works would suffice), or for particulars of the balance of the contract price. At paragraph 35 I commented:

> As to the estimated cost of rectification of $660,000 and the cost of completion claimed to be $1,125,591.50 – a total of $2,126,591.50 giving a claimed cost over-run of $316,763.70, it seems extraordinary that Bevnol would seek further and better particulars of the 'amount comprising the *'balance of the Contract Price'*. The contract price is set out in paragraph 5 of the Further Amended Points of Claim as $1,809,827.80 inclusive of GST. It is a simple calculation to determine the balance of the contract price – subtracting the contract price from the total claimed for rectification and completion costs, which on my calculations equals $316,763.70 – the amount claimed as the cost over-run.

32 However, there was simply no excuse for Seachange's continued failure to obtain an expert report and at paragraph 37 I said:

> I note with concern Seachange's failure to obtain an expert report on which it could rely as previously ordered by the tribunal. As noted above, the orders of 24 January 2007 required the applicant to file and serve its expert reports by 16 April 2007. The BSS report was attached to the Amended Points of Claim dated 23 May 2007. However, this report did not contain any costings. Notwithstanding the orders of 12 July 2007 it has steadfastly failed to respond to the request for further and better particulars of the rectification and completion costs, and did not engage an expert to provide those costings until some time between the hearing on 27 October 2008 and its continuation part-heard on 6

November 2008. As noted above, the expert report will not be available until late February 2009.

33 It is submitted on behalf of Seachange in its submissions dated 21 March 2011 that in considering this application for costs I should have regard to:

(i) the failure of Bevnol to obtain any expert report in response to Seachange's expert report; and

(ii) Bevnol was not unduly prejudiced by Seachange's delay in filing the further and better particulars.

In my view these are not relevant considerations in determining whether Seachange should pay Bevnol's costs of the application for further and better particulars.

34 Although Bevnol's application was not entirely successful I am persuaded that it is fair to exercise the tribunal's discretion under s109(2) and order Seachange to pay Bevnol's costs of and incidental to the application for further and better particulars. Seachange's persistent failure to obtain an expert report, and its steadfast failure to respond to Bevnol's request for further and better particulars clearly falls within s109(3)(b). I accept Seachange's submission that such costs must only be those clearly referable to Bevnol's application for further and better particulars and do not include appearances where such costs cannot be defined. This will be a matter for the Victorian Costs Court if the costs are taxed. Noting my comments above, I am not persuaded that there is anything so exceptional in Seachange's conduct of this application to attract an order for indemnity costs.

Seachange's application to deny Bevnol access to subpoenaed documents

35 Bevnol issued a number of summonses for the production of documents which have been complied with. Both Seachange and Mr De Simone sought orders preventing Bevnol or its solicitors inspecting the documents, produced by Jack Chrapot and Michael Brereton. After a number of directions hearings and interlocutory orders, the application was finally heard by Judge Harbison on 7 December 2009 and 3 February 2010. On 18 March 2010 her Honour made orders which are accompanied by comprehensive Reasons. Relevantly these orders provide:

2. The application of Seachange and De Simone to be granted leave to summons witnesses to be called on the application that the summonses directed to Chrapot and Brereton be set aside as an abuse of process and on the claim that certain documents should not be released on the ground of confidentiality is refused.

3. I declare the documents produced to the Tribunal by Jack Chrapot in response to the summons to witness dated 29 April 2009 and Michael Brereton in response to the summons to witness dated 16 December 2008 should be made available for inspection by the legal representatives of the respondents with the following exceptions –

(a) all of the documents which I have determined relate to the subject matter of the stay application, being as follows:

(i) of the documents produced by Brereton – documents 344-355, documents 348-349, document 331, document 271, document 290-291 documents 212 to 255;

(b) all of the documents which I have determined may be protected by client legal privilege, being documents numbered as follows:

(i) in the documents produced by Brereton – the email dated 10 April 2007 contained in document number 984;

(ii) document 140 dated 18 May 2006;

(iii) document 186 undated;

(iv) document 1117 dated 30 April 2007 – but only the second page of this document commencing "There was a hearing today at VCAT";

(v) document 1163 dated 3 May 2007;

(vi) document 1130 dated 2 May 2007;

(vii) document 1050 dated 20 April 2007;

(viii) documents 1193-1196;

(ix) document 1192;

(x) document 1023;

(xi) document 1155-1162;

(xii) document 1145;

(xiii) document 1147 dated 3 May 2007.

(c) The document which I have determined is irrelevant to this proceeding being document 137 in the documents disclosed by Brereton.

4. Prior to inspection of the documents referred to in these orders, the legal representatives of the respondents must file a written undertaking with the Tribunal not to disclose the contents of these documents to any person, including directors and agents of the respondent, until further order of the Tribunal.

36 At paragraph 697 of her reasons her Honour confirmed the documents were not to be released to the respondent. No orders were made for the copying of the documents once inspected.

37 The undertaking referred to in Order 4 was provided by Bevnol's legal representatives on or about 23 March 2010.

38 Seachange and Mr De Simone were partially successful in their application. Their claim for privilege over 13 documents comprising 95 pages of a total of 3537 pages was upheld. First, as can be seen from the above orders, her Honour determined that only a handful of the documents produced in response to the summonses were protected by client legal privilege. However, her Honour restricted access to all other documents to Bevnol's

legal representatives, and then only upon the filing of a written undertaking not to disclose the content of the documents to anyone without leave of the tribunal.

39 Bevnol, in its submissions of 5 November 2010, submits that it was disadvantaged because Judge Harbison allowed Mr De Simone a further indulgence on 8 December 2009 when she allowed him time to prepare a further affidavit and material in support of his claims for privilege. I note that her Honour adjourned that hearing to a 'hearing on the papers' and made orders for the filing of further material by all parties. Relevantly Order 10 of the order dated 8 December 2009 provides:

> Guiseppe De Simone and Seachange Management Pty Ltd (ACN 091443211) must pay the party - party costs of Bevnol thrown away by reason of the adjournment of today's hearing, to be taxed on Supreme Court scale, and I certify for the attendance of counsel today at Supreme Court scale.

40 As Bevnol has already obtained a costs order in respect of the adjournment of that hearing, I do not consider the adjournment, or the liberty granted to all parties to file further material to be relevant considerations in deciding this application for costs. Had Mr De Simone or Seachange complied with the previous orders of the tribunal Bevnol may well have filed submissions in reply, albeit earlier. Although the tribunal's file is now with the Supreme Court, a review of the tribunal's case management database reveals that the only reply material filed by Bevnol were affidavits by its solicitor Brendan Archer filed on 8 December 2008 and 14 January 2010; and its submissions dated 7 January 2010 and 14 January 2010.

41 In an email to the tribunal dated 17 February 2011 Mr De Simone submitted that in considering this costs application the tribunal should take into account that Bevnol's conduct in relation to those applications was 'based on a lack of disclosure of the true circumstances in which disclosure was being sought'. In particular, he alleges her Honour's orders were rendered nugatory by prior wrongful access to the documents by Bevnol.

42 These are matters which have already been considered by her Honour, and in any event they are not relevant to my consideration of this costs application.

43 Having regard to s109 I am not persuaded it would be fair to order Seachange and/or Mr De Simone to pay Bevnol's costs of this application. The appropriate and fair order is that there be no orders for costs.

SEACHANGE'S COSTS APPLICATIONS

44 Seachange applies for its costs of defending Bevnol's application for an asset preservation order which I heard on 19 November 2008, and determined on 26 November 2008.[12] Order 2 of the orders of 26 November 2008 provided:

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[12] *Seachange Management Pty Ltd v Bevnol Constructions & Developments Pty Ltd & Ors* [2008] VCAT 240

> Costs reserved with liberty to apply. Any application for costs will be heard at the next directions hearing, the date and time of which the parties will be advised.

45 On 10 February 2011 Seachange filed an Application for Directions/Orders seeking the following orders:

> 1. That pursuant to the liberty to apply in order 2 of the orders made on the Tribunal on 26 November 2008, the costs reserved therein be allowed to the Applicant ("**Seachange"**) and paid by the Respondent ("**Bevnol**") in relation to and arising from the application by Bevnol for an asset preservation order.
> 2. That the costs be allowed on a full indemnity basis and include the professional costs incurred in the preparation of accounts and affidavits in opposition as well as the attendance of both counsel and solicitor at the hearing and all necessary attendances and preparation.

46 Although I anticipated that any application for costs would be made shortly after the orders made on 26 November 2008, I note this application was not made until February 2011.

47 It is submitted on behalf of Bevnol that it is premature to determine this costs application pending the hearing and determination of the substantive proceeding by the Supreme Court:

> …because DP Aird obviously did not believe the application was unreasonably opposed'. Clearly, in all the circumstances, the DP was of a mind to reserve the costs and let the judge, who, is seized of the overall matter, having heard all of the evidence and considered the documentation relied upon, can determine the question of costs.[13]

This ignores the precise terms of order 2 of the orders dated 26 November 2008 (set out above).

48 Not only is this submission disingenuous in circumstances where Bevnol is pressing for its costs applications to be heard and determined before the final determination of the referred proceeding, now that the proceeding has been referred to the Supreme Court it is desirable that all outstanding costs applications be determined by the tribunal without delay.

49 At the commencement of the hearing on 19 November 2008 Seachange contested the tribunal's jurisdiction to grant an asset preservation order. For reasons which are set out in the Reasons of 26 November I ruled there was jurisdiction for the tribunal to grant such an order, if satisfied it was appropriate to do so.

50 Both parties relied on affidavits filed by their solicitors. As I observed in paragraph 8 of my Reasons:

> …For reasons which are unclear to me neither party considered it necessary to file affidavits deposed to by its principals. Mr Lustig was

[13] Respondent's costs submissions dated 29 April 2011.

> cross examined at length about his understanding of Seachange's financial affairs and records. Not surprisingly he was unable to provide any financial or accounting evidence.

51 After determining that Bevnol was unable to clear the first hurdle for any asset preservation order: a reasonable belief that there would be a concealment or dissipation of assets by Seachange if the property were to be sold, I concluded at paragraph 18:

> I am not persuaded there is any merit in the application and it will be dismissed. Further, I am not persuaded that, in the event of a sale of the land, Seachange should be obliged to give Bevnol 21 days written notice of settlement.

52 Curiously at paragraph 10 of its Submissions dated 29 April 2011, filed in reply to the Jurblum parties' application for costs, and in its reply submissions dated 13 May 2011, Bevnol submits that the tribunal ought to have determined in November 2008 that Seachange was not solvent. I am referred to a recent decision of the Supreme Court dismissing Pital's application that Seachange be wound-up[14] where Efthim AsJ said at [24]

> I cannot be satisfied on the evidence that the defendant [Seachange] is solvent.

53 However, his Honour's findings in March 2011 are irrelevant to my consideration of Seachange's costs application. I am unable to revisit my orders of November 2008 from which I note Bevnol did not seek leave to appeal to the Supreme Court.

54 Further, in the last paragraph of my Reasons, I said at [18]:

> I am not persuaded that there is any merit in the application and it will be dismissed. Further I am not persuaded that in the event of a sale of the land, Seachange should be obliged to give Bevnol 21 days written notice of settlement.

55 The application was dismissed on the evidence, facts and circumstances before the tribunal in November 2008. Although it was not a matter I took into account in considering that application, it is noteworthy that it was made without the usual undertaking as to damages. It is appropriate costs be considered in that context. The recent Supreme Court decision is irrelevant having been made some two and a half years later and in a different proceeding.

56 The application for an asset preservation involved complex questions of fact and law including a determination of Seachange's objection to the tribunal's jurisdiction. Whilst neither party was particularly well prepared, I consider it fair and appropriate instance to exercise the tribunal's discretion under s109(2) having regard in particular to s109(3)(c) and (d), and order Bevnol to pay Seachange's costs of and incidental to this application. Again, noting my earlier comments, I am not persuaded there is anything so unusual about

[14] *Pital Business Pty Ltd v Seachange Management Pty Ltd* per Efthim AsJ, 25 March 2011.

this application to persuade me that costs should be ordered on an indemnity basis.

THE 'JURBLUM' PARTIES COSTS APPLICATION

57 Paul Mark Custodians Pty Ltd and Martin Jurblum are respectively the third and fourth respondents to counterclaim and with Dark Star by the Sea Pty Ltd are collectively referred to as the 'Jurblum' parties. As noted in my Reasons dated 26 November 2008, Dark Star by the Sea Pty Ltd was given leave to intervene in the hearing of Bevnol's application for an asset preservation order being *'apparently involved directly or indirectly in the Seachange Development partnership'*.

58 On 21 March 2011 the Jurblum parties filed an Application for Directions/Orders seeking the following orders [pursuant to the orders of 8 March 2011]:

i. Bevnol Constructions & Developments Pty Ltd ("**Bevnol**") pay the reserved costs of the Jurblum parties in relation to and arising from the application by Bevnol for an asset preservation order.

ii. The costs ordered include the attendance of both counsel and solicitor at the hearing and all necessary attendances and preparation.

59 In the submissions attached to the application for directions/orders, the Jurblum parties seek their costs be fixed in the sum of $4,580 calculated as follows:

(a) solicitor's costs of appearing at Directions Hearing

6 November 2008	$ 150.00

(b) preparation by counsel and appearance at Directions Hearing

19 November 2008	$ 2,450.00

(c) preparation by solicitor and instructing at hearing

19 November 2008	$ 1,980.00

60 Inexplicably, Bevnol submits these costs should be reserved pending the final determination of the referred proceeding by the Supreme Court. I repeat my earlier comments.

61 Although I am satisfied it is fair to order Bevnol pay the Jurblum parties' costs I am not persuaded those costs should include the costs of instructing solicitor and counsel on 19 November 2008 as the involvement of the Jurblum parties was minimal. In the circumstances I will allow counsel's fees and fix the costs in the sum of $2,600.

DEPUTY PRESIDENT C. AIRD